No. 03-281

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IN THE

Supreme Court of the United States

CONSUMERS UNION OF UNITED STATES, INC.,
Petitioner,

v.

SUZUKI MOTOR CORP.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICI CURIAE* OF ABC, INC., THE ASSOCIATED PRESS, BELO CORP., CABLE NEWS NETWORK LP, LLP, CALIFORNIA NEWSPAPER PUBLISHERS ASSOCIATION, CBS BROADCASTING INC., THE COPLEY PRESS, INC., DAILY NEWS, L.P., DOW JONES & COMPANY, INC., FREEDOM COMMUNICATIONS, INC., GANNETT CO., INC., THE HEARST CORPORATION, KNIGHT-RIDDER, INC., MAGAZINE PUBLISHERS OF AMERICA, THE McCLATCHY COMPANY, NATIONAL ASSOCIATION OF BROADCASTERS, NATIONAL BROADCASTING COMPANY, INC., NATIONAL PUBLIC RADIO, INC., NEWSPAPER ASSOCIATION OF AMERICA, NEWSWEEK, INC., THE NEW YORK TIMES COMPANY, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, SOCIETY OF PROFESSIONAL JOURNALISTS, TIME INC., AND TRIBUNE COMPANY IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF THE *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. SUBSTANTIAL CONFLICT EXISTS AMONG THE CIRCUITS ABOUT THE PROPER APPLICATION OF THE "INDEPENDENT EXAMINATION RULE" ON A MOTION FOR SUMMARY JUDGMENT	4
A. This Court's Prior Decisions Have Caused Confusion About the Proper Application of the "Independent Examination Rule" on Summary Judgment	4
B. Lower Courts Have Reached Conflicting Conclusions About the "Independent Examination Rule" on Summary Judgment	7
II. THE NINTH CIRCUIT'S STANDARD UNDERMINES THIS COURT'S HOLDINGS CONCERNING THE CONSTITUTIONAL PROTECTION AFFORDED SPEECH ABOUT PUBLIC FIGURES	10
III. THE NINTH CIRCUIT'S STANDARD THREATENS THE ROBUST AND WIDE-OPEN EXCHANGE INTENDED BY THE FIRST AMENDMENT	12
A. The Standard Adopted By the Majority Below Will All But Eliminate the Availability of Summary Judgment on "Actual Malice"	13

TABLE OF CONTENTS—Continued

Page

B. The Evidence Deemed Sufficient Below to Create a "Genuine" Dispute About Actual Malice Would Require a Jury Trial Virtually Every Time Product Safety Reporting is Challenged 17

CONCLUSION 20

APPENDIX 1a

TABLE OF AUTHORITIES

CASES Page

Aequitron Medical Inc. v. CBS, 964 F. Supp. 704 (S.D.N.Y. 1997) 20
Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) ..... *passim*
Bose Corp. v. Consumers Union, 466 U.S. 485 (1984) ..... *passim*
Bose Corp. v. Consumers Union, 692 F.2d 189 (1st Cir. 1982), *aff'd*, 466 U.S. 485 (1984) 15, 16
Bose Corp. v. Consumers Union, 84 F.R.D. 682 (D. Mass. 1980) 15
Bressler v. Fortune Magazine, 971 F.2d 1226 (6th Cir. 1992) 15
Brueggemeyer v. ABC, 684 F. Supp. 452 (N.D. Tex. 1988) 20
Carr v. Forbes, 259 F.3d 273 (4th Cir. 2001), *cert. denied*, 535 U.S. 988 (2002) 9
Catrone v. Thoroughbred Racing Associations, 929 F.2d 881 (1st Cir. 1991) 8
Chafin v. Gibson, 578 S.E.2d 361 (W. Va. 2003) .. 16
Cobb v. Time, Inc., 278 F.3d 629 (6th Cir.), *cert. denied*, 537 U.S. 878 (2002) 14, 15
Cobb v. Time, Inc., No. 3:94-0836, 1995 WL 861518 (M.D. Tenn. Aug. 30, 1995) 15
Container Manufacturing Inc. v. CIBA-GEIGY Corp., 870 F. Supp. 1225 (D.N.J. 1994) 20
Contemporary Mission Inc. v. New York Times Co., 842 F.2d 612 (2d Cir. 1988) 9
F&J Enterprises, Inc. v. CBS, 373 F. Supp. 292 (N.D. Ohio 1974) 20
Flotech, Inc. v. E.I. DuPont De Nemours & Co., 814 F.2d 775 (1st Cir. 1987) 20

TABLE OF AUTHORITIES—Continued

	Page
Foretich v. ABC, Nos. Civ. A 93-2620, Civ. A 94-0037 (HHG), 1997 WL 669644 (D.D.C. Oct. 17, 1997)	18
George v. Fabri, 548 S.E.2d 868 (S.C. 2001)	9
Hammer v. Slater, 20 F.3d 1137 (11th Cir. 1994)	8
Harris v. Quadracci, 48 F.3d 247 (7th Cir. 1995)	8
Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657 (1989)	*passim*
Herbert v. Oklahoma Christian Coalition, 992 P.2d 322 (Okla. 2000)	9
Kaelin v. Globe Communications Corp., 162 F.3d 1036 (9th Cir. 1998)	8, 18
Lewis v. Reader's Digest Association, 366 F. Supp. 154 (D. Mont. 1973)	20
Liberty Lobby, Inc. v. Dow Jones & Co., 838 F.2d 1287 (D.C. Cir. 1988)	9
Masson v. New Yorker Magazine, Inc., 501 U.S. 496 (1991)	6, 7
McFarlane v. Sheridan Square Press, Inc., 91 F.3d 1501 (D.C. Cir. 1996)	19
Mercer v. Cedar Rapids, 104 F. Supp. 2d 1130 (N.D. Iowa 2000)	15
Mercer v. Cedar Rapids, 308 F.3d 840 (8th Cir. 2002)	15
National Nutritional Foods Association v. Whelan, 492 F. Supp. 374 (S.D.N.Y. 1980)	20
New York Times Co. v. Sullivan, 376 U.S. 254 (1964)	*passim*
Newton v. NBC, 13 Media L. Rep. 1224 (D. Nev. 1986)	15
Newton v. National Broadcasting Co., 930 F.2d 662 (9th Cir. 1990)	15
Pennekamp v. Florida, 328 U.S. 331 (1946)	5

TABLE OF AUTHORITIES—Continued

	Page
Perez v. Scripps-Howard Broadcasting Co., 520 N.E.2d 198 (Ohio 1988)	8
Peter Scalamandre & Sons v. Kaufman, 113 F.3d 556 (5th Cir. 1997)	18
Quantum Electronics Corp. v. Consumers Union, 881 F. Supp. 753 (D.R.I. 1995)	20
In re R.M.J., 455 U.S. 191 (1982)	20
Reuber v. Food Chemical News, Inc., 925 F.2d 703 (4th Cir. 1991)	18
Revell v. Hoffman, 309 F.3d 1228 (10th Cir. 2002), *petition for cert. filed*, 71 U.S.L.W. 3751 (Mar. 10, 2003) (No. 02-1718)	8
Safe Site, Inc. v. National Rifle Association, 253 F. Supp. 418 (D.D.C. 1966)	20
Sassone v. Elder, 626 So. 2d 345 (La. 1993)	16
Secrist v. Harkin, 874 F.2d 1244 (8th Cir. 1989)	9
Southall v. Little Rock Newspapers, 964 S.W.2d 187 (Ark. 1998)	9
Speer v. Ottaway Newspapers, Inc., 828 F.2d 475 (8th Cir. 1987)	19
Suzuki Motor Corp. v. Consumers Union, 330 F.3d 1110 (9th Cir. 2003)	*passim*
Terminiello v. Chicago, 337 U.S. 1 (1949)	18
Torgerson v. Journal/Sentinel, Inc., 563 N.W.2d 472 (Wis. 1997)	8
Underwager v. Salter, 22 F.3d 730 (7th Cir. 1994)	19
United Medical Laboratories v. CBS, 404 F.2d 706 (9th Cir. 1968)	20
Veilleux v. NBC, 8 F. Supp. 2d 23 (D. Me. 1998)	15
Veilleux v. NBC, 206 F.3d 92 (1st Cir. 2000)	15
Waters v. Churchill, 511 U.S. 661 (1994)	13

TABLE OF AUTHORITIES—Continued

Page

Welch v. American Publishing Co., 3 S.W.3d 724 (Ky. 1999) 9
Wiemer v. Rankin, 790 P.2d 347 (Idaho 1990) 9
Yiamouyiannis v. Consumers Union, 619 F.2d 932 (2d Cir. 1980) 20
Zerangue v. TSP Newspapers, Inc., 814 F.2d 1066 (5th Cir. 1987) 8

RULES

S. Ct. R. 37.6 1
S. Ct. R. 37.2(a) 1

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David A. Anderson, *Is Libel Law Worth Reforming?*, 140 U. Pa. L. Rev. 487 (1991) 16, 17
Rachel Carson, *Silent Spring* (1962) 19
Katie Eccles, *The Agent Orange Case: A Flawed Interpretation of the Federal Rules of Civil Procedure Granting Pretrial Access to Discovery*, 42 Stan. L. Rev. 1577 (1990) 13, 14
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TABLE OF AUTHORITIES—Continued

Page

Harry Kalven, Jr., *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 Sup. Ct. Rev. 191 11

Gina Kolata, *Animal Fat Is Tied to Colon Cancer*, N.Y. Times, Dec. 13, 1990..... 19

Martin B. Louis, *Summary Judgment and the Actual Malice Controversy in Constitutional Defamation Cases*, 57 S. Cal. L. Rev. 707 (1984)..... 16

Scott M. Matheson, Jr., *Procedure in Public Person Defamation Cases: The Impact of the First Amendment*, 66 Tex. L. Rev. 215 (1987).. 17

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Jennifer Peck, *The Crib-Sheet Catastrophe*, Good Housekeeping, Nov. 1998..... 19

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Kathleen M. Sullivan, *Cheap Spirits, Cigarettes, and Free Speech: The Implications of* 44 Liquormart, 1996 Sup. Ct. Rev. 123..... 20

INTEREST OF THE *AMICI CURIAE*

Amici curiae include the country's leading news services, the publishers of daily newspapers and weekly news magazines, national broadcast and cable news networks, and national associations of journalists, publishers and broadcasters (the "*Press Amici*").[1] *Press Amici* urge review of this case both because substantial confusion exists among the circuits on the issues concerning summary judgment in libel lawsuits that so deeply divided the Ninth Circuit, and because the unique and restrictive standard adopted below cannot be reconciled with this Court's prior rulings protecting speech about public figures. If left undisturbed, the Ninth Circuit's holding threatens to curtail reporting about product safety, public health, scientific debate and other issues of obvious importance.

Ever since *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), defined a limited category of false speech that is nonetheless protected by the First Amendment, summary judgment has played a pivotal role in ameliorating the punitive impact of libel lawsuits filed by public figures such as Suzuki Motor Corporation. Summary disposition minimizes the *in terrorem* effect that baseless litigation imposes on a newsroom. *Press Amici* regularly seek summary judgment in libel lawsuits and succeed nearly eighty percent of the time in disposing of them before trial.[2]

The Ninth Circuit's cramped view of a court's role on summary judgment will inevitably weaken its utility. As Judge Kozinski, writing for eleven judges of the Ninth Circuit

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[1] A complete list of the *Press Amici* is set out in the Addendum. Pursuant to S. Ct. R. 37.6, the *Press Amici* state that no counsel for a party to this action authored any portion of this brief *amici curiae* and that no person or entity, other than the *Press Amici*, made a monetary contribution to the preparation or submission of this brief. Written consent of all parties to the filing of this brief has been filed with the Clerk of the Court pursuant to S. Ct. R. 37.2(a).

[2] *See* p. 13 & n.18 *infra*.

who voted (unsuccessfully) for *en banc* review of the panel decision, recognized:

> The practical effect of the panel's decision is that our review for sufficiency at summary judgment is now governed by one standard, while our review after a jury verdict is governed by another. Cases will now often proceed to trial, even though the court can tell ahead of time that the plaintiff's evidence will not support a jury verdict under *New York Times*. What possible purpose is served by such mock trials?

Suzuki Motor Corp. v. Consumers Union, 330 F.3d 1110, 1114 (9th Cir. 2003) (Kozinski, J., dissenting).

SUMMARY OF ARGUMENT

1. The decision below deserves review because summary judgment plays a critical role in minimizing the speech-restricting impact of libel litigation, and because substantial confusion exists among the circuits about the independent judicial examination of the evidence of "actual malice" that is required at the summary judgment stage. In *New York Times Co. v. Sullivan*, this Court adopted the "actual malice" standard to define a category of false and defamatory speech that is nonetheless protected by the First Amendment. Simultaneously, the Court in *Sullivan* created two procedural protections for speech about public persons—a requirement that actual malice be proven by "clear and convincing" evidence and a constitutional obligation imposed on judges to examine the record independently and determine whether that heightened burden of proof has been met. Twenty years later, in *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984), the Court underscored that the "independent examination rule" requires *judges* to perform a searching review of the record supporting a libel verdict to ensure that liability is not imposed on protected speech. In this case, the Ninth Circuit concluded that no such review may properly be undertaken before a trial has occurred. Citing *dicta* in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) (language then-

Justice Rehnquist described in dissent, 477 U.S. at 269, as sounding "much like a treatise about cooking by someone who has never cooked"), the Ninth Circuit held that summary judgment must be denied if the evidence presented by a public figure plaintiff, viewed in isolation, could support a finding of actual malice.

The Ninth Circuit's restrictive view stands in conflict with other courts. Several circuits, including the First, Fifth, Seventh, Tenth and Eleventh, have adopted the position of the dissenting member of the Ninth Circuit panel. In those circuits, a court must determine on summary judgment whether a reasonable jury could find actual malice on the basis of the *entire* record, resolving all factual disputes and drawing all inferences in plaintiff's favor. Other circuits, including the Second, Fourth, Eighth and District of Columbia, have adopted the position urged below by the eleven judges who dissented from denial of *en banc* consideration. In those circuits, the same independent judicial examination of the record is required on summary judgment as on appeal. No other circuit has endorsed the Ninth Circuit's myopic approach.

2. Review should be granted for the further reason that the summary judgment standard adopted by the Ninth Circuit cannot be reconciled with this Court's prior holdings. *Sullivan* and its progeny establish that the existence of "actual malice" sufficient to remove the First Amendment's protection from speech about a public figure is a question of law to be determined independently by a judge. Treating "actual malice" on summary judgment like a simple factual dispute, the Ninth Circuit has misconstrued both the nature of the "independent examination rule" articulated in *Sullivan* and *Bose* and the role of the "actual malice" standard as a tool for defining and limiting the category of unprotected speech.

3. Review should also be granted because the Ninth Circuit's decision threatens to limit the speech of any media organization that disseminates the news nationally by

requiring a full trial even where, as here, the trial judge concludes that the challenged speech is protected by the First Amendment as a matter of law. Such trials not only inhibit speech about public matters, they serve no useful purpose. Indeed, the reported cases reveal that, even now, an estimated two-thirds of libel *verdicts* rendered for those plaintiffs who survive summary judgment are ultimately reversed on appeal for lack of the requisite proof of actual malice.[3] In this case, *every* judge who has looked at the whole record agrees that it does not contain constitutionally sufficient evidence of actual malice. Nevertheless, under the restrictive rule adopted by the Ninth Circuit majority—one that looks only at plaintiff's evidence—a trial is required. Such a rule will inevitably impose enormous costs on both media defendants and the courts, increasing the number of trials and appeals as well as the number of verdicts reversed on appeal. And, if the type of evidence relied on below is deemed sufficient to raise an issue of "actual malice" requiring a full trial, the Ninth Circuit's holding is likely to have a particularly harsh impact on consumer and product safety reporting.

ARGUMENT

I. SUBSTANTIAL CONFLICT EXISTS AMONG THE CIRCUITS ABOUT THE PROPER APPLICATION OF THE "INDEPENDENT EXAMINATION RULE" ON A MOTION FOR SUMMARY JUDGMENT

A. This Court's Prior Decisions Have Caused Confusion About the Proper Application of the "Independent Examination Rule" on Summary Judgment

In *Sullivan*, this Court held that speech about public officials (later extended to public figures) is presumptively protected by the First Amendment and that "neither factual

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[3] *See* p. 14 & n.20 *infra*.

error nor defamatory content suffices to remove the constitutional shield." 376 U.S. at 273. Rather, constitutional protection for speech about public figures is lost only when the plaintiff "proves that the statement was made with 'actual malice.'" *Id.* at 279-80. To ensure that protected speech is not infringed, the Court simultaneously erected two procedural safeguards for speech about public figures: a heightened evidentiary standard requiring actual malice to be established with convincing clarity, and independent judicial review of the evidence of actual malice—a review that must encompass "the statements in issue and the circumstances under which they were made." *Id.* at 285 (quoting *Pennekamp v. Florida*, 328 U.S. 331 (1946)).

Twenty years later, in *Bose Corp. v. Consumers Union*, the Court reaffirmed that "the rule of independent review assigns to judges a *constitutional* responsibility that cannot be delegated to the trier of fact." 466 U.S. at 501 (emphasis added). The Court stressed the importance of such review "both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited." *Id.* at 505. As the Court emphasized in *Bose*, 466 U.S. at 511:

> Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of "actual malice."

Both *Sullivan* and *Bose* came to this Court following the imposition of defamation liability at a trial—in *Sullivan*, after a jury verdict, and in *Bose*, after a bench trial. As a result, neither decision addressed directly the scope of a court's obligation to undertake an "independent review" of the record evidence of actual malice at the summary judgment stage. In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 254, 257,

however, the Court held both that a judge ruling on a motion for summary judgment must "view the evidence presented through the prism of the substantive evidentiary burden" and that summary judgment in a public figure libel action "must be guided by the *New York Times* 'clear and convincing' evidentiary standard in determining whether a genuine issue of actual malice exists." While the Court had no occasion to address the "independent examination rule" in *Liberty Lobby*, it did direct that:

> a trial judge *must bear in mind* the actual *quantum* and *quality* of proof necessary to support liability under *New York Times*. For example, there is no *genuine* issue if the evidence presented in the opposing affidavits is of insufficient *caliber* or *quantity* to allow a rational finder of fact to find actual malice by clear and convincing evidence.

Id. at 254 (emphasis added).

Justices Rehnquist and Brennan, in separate dissents, nevertheless predicted that *Liberty Lobby* would confuse the lower courts and "cause the decisions of trial judges on summary judgment motions in libel cases to be more erratic and inconsistent than before." *Id.* at 272-73 (Rehnquist, J., dissenting). Justice Rehnquist lamented the majority's "great[] mistake" in providing only "abstractions and paraphrases of abstractions" as guidance to the lower courts, *id.* at 269, while Justice Brennan forecast "increased confusion in the district and appellate courts," *id.* at 265 (Brennan, J., dissenting).

This Court has yet to address directly the central issue presented here: whether a court's obligation to undertake an "independent examination" of the record evidence of actual malice in a public figure libel action applies at the summary judgment stage in the same way it applies on appeal.[4] And,

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[4] In *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1991), the Court applied *Liberty Lobby* in a libel case that presented the issue of

as predicted by the dissenters in *Liberty Lobby*, substantial confusion and inconsistent holdings have inevitably emerged throughout the lower courts.

B. Lower Courts Have Reached Conflicting Conclusions About the "Independent Examination Rule" on Summary Judgment

The several opinions issued by Ninth Circuit judges in this case mirror the widespread confusion among courts, state and federal. The Ninth Circuit's holding, reflected in the panel's majority and concurring opinions, authorizes a court to examine *only* the evidence of actual malice proffered by the *plaintiff* in opposing summary judgment. If that evidence, standing alone, would permit a reasonable jury to find actual malice, summary judgment must be denied without regard to contrary evidence presented by a defendant, even if that evidence is undisputed. *Suzuki*, 330 F.3d at 1135. The majority below thus acknowledged the substantial, uncontradicted evidence supporting Consumers Union ("CU"), but rejected this evidence as largely irrelevant:

> [CU's] characterization of its own evidence as overwhelming and its disparagement of Suzuki's evidence as out of context begs the question that we must resolve. . . . [T]he issue is whether there is *adequate evidence to support the contrary view*—namely, that behind the veneer of accuracy, CU was disseminating the Samurai story with knowledge, or reckless disregard, of its falsity. *While it may be true that CU's evidence of meticulous reporting ultimately has more weight* than

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whether an author's alteration of quotes amounted to actual malice. The Court confirmed that the existence of actual malice is a "constitutional question," even "in the framework of a summary judgment motion." *Id.* at 513. Nevertheless, because the *only* undisputed evidence favored the plaintiff, *id.* at 269, the Court was not called upon to explain how the independent examination rule applies in determining whether a summary judgment record reflects a *genuine* dispute about the presence of actual malice.

> Suzuki's evidence of actual malice, *that is not a question to be resolved here.*[5]

Among the federal courts, only the Ninth Circuit has adopted this restrictive rule.[6] Judge Ferguson, the panel dissenter, objected that the majority "fail[s] to grasp how the *additional* procedural protection of the independent examination functions." *Id.* at 1142 (Ferguson, J., dissenting) (emphasis in original). He concluded that the "independent examination" rule requires a court to review the summary judgment record *as a whole* and consider "not just that which favors the plaintiff," but also the undisputed evidence proffered by the defendant. *Id.* at 1145. Looking at *all* the evidence from the perspective of a reasonable jury, and drawing all inferences in plaintiff's favor, Judge Ferguson would have affirmed the trial court's entry of summary judgment. *See id.* at 1143. Judge Ferguson's application of the "independent examination" rule has been embraced by the First, Fifth, Seventh, Tenth and Eleventh Circuits, as well as by several state courts.[7]

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[5] *Suzuki*, 330 F.3d at 1134-35 (citations omitted) (emphasis added). Judge Graber concurred in this holding, emphasizing that the independent examination rule must be applied differently on summary judgment than after trial. *Id.* at 1141 (Graber, J., concurring).

[6] *See also Kaelin v. Globe Communications Corp.*, 162 F.3d 1036, 1042 (9th Cir. 1998) (court reviewed only evidence produced by plaintiff and denied summary judgment because "a reasonable juror could find actual malice").

[7] *See, e.g., Catrone v. Thoroughbred Racing Ass'ns*, 929 F.2d 881 (1st Cir. 1991); *Zerangue v. TSP Newspapers, Inc.*, 814 F.2d 1066, 1071 (5th Cir. 1987); *Harris v. Quadracci*, 48 F.3d 247 (7th Cir. 1995); *Revell v. Hoffman*, 309 F.3d 1228, 1233-34 (10th Cir. 2002), *petition for cert. filed*, 71 U.S.L.W. 3751 (Mar. 30, 2003) (No. 02-1718); *Hammer v. Slater*, 20 F.3d 1137 (11th Cir. 1994); *Perez v. Scripps-Howard Broad. Co.*, 520 N.E.2d 198 (Ohio 1988); *Torgerson v. Journal/Sentinel, Inc.*, 563 N.W.2d 472 (Wis. 1997).

Judge Kozinski, and ten other judges dissenting from the denial of rehearing *en banc*, applied the "independent examination" rule in a third way. Observing that "it hardly 'preserve[s] the precious liberties established and ordained by the Constitution' to treat a First Amendment case the same as a slip-and-fall," these judges would require on summary judgment the same "independent examination" by a judge as must occur after a trial.[8] To be sure, these judges recognized that all disputes of historical fact and all "questions about a witness's credibility" must be resolved at summary judgment in favor of the nonmoving party. Within these constraints, however, they concluded that a judge:

> must take the further step of independently "determin[ing] whether the record establishes actual malice with convincing clarity." And *that* process . . . *does* involve weighing the evidence. If it did not, the independent examination rule would be meaningless.[9]

The Second, Fourth, Eighth and District of Columbia Circuits, as well as a host of state courts, all have applied the "independent examination rule" in this manner.[10]

As these conflicting approaches attest, confusion has carried the day in the wake of *Liberty Lobby*. Such "[u]ncertainty as to the scope of the constitutional protection can only dissuade protected speech—the more elusive the

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[8] *Suzuki*, 330 F.3d at 1113 (Kozinski, J., dissenting) (quoting *Bose*, 466 U.S. at 510-11).

[9] 330 F.3d at 1113-14 (quoting, *inter alia*, *Bose*, 466 U.S. at 514).

[10] *See, e.g.*, *Contemporary Mission Inc. v. New York Times Co.*, 842 F.2d 612, 622 (2d Cir. 1988); *Carr v. Forbes*, 259 F.3d 273 (4th Cir. 2001), *cert. denied*, 535 U.S. 988 (2002); *Secrist v. Harkin*, 874 F.2d 1244 (8th Cir. 1989); *Liberty Lobby, Inc. v. Dow Jones & Co.*, 838 F.2d 1287, 1293 (D.C. Cir. 1988); *Southall v. Little Rock Newspapers*, 964 S.W.2d 187 (Ark. 1998); *Wiemer v. Rankin*, 790 P.2d 347 (Idaho 1990); *Welch v. Am. Publ'g Co.*, 3 S.W.3d 724 (Ky. 1999); *Herbert v. Okla. Christian Coalition*, 992 P.2d 322 (Okla. 2000); *George v. Fabri*, 548 S.E.2d 868 (S.C. 2001).

standard, the less protection it affords."[11] Pleading for review of the decision below by this Court, Judge Kozinski concluded:

> Allowing a plaintiff to get to trial on a record that will not support a verdict under *New York Times* does not make sense, and if some of the Court's precedents can be read to suggest this result, the Court would do us all a great favor by explaining that it intended no such absurdity.[12]

II. THE NINTH CIRCUIT'S STANDARD UNDERMINES THIS COURT'S HOLDINGS CONCERNING THE CONSTITUTIONAL PROTECTION AFFORDED SPEECH ABOUT PUBLIC FIGURES

The decision below warrants review for the further reason that it cannot be squared with this Court's decisions defining the type of speech about public figures that is protected by the First Amendment and the role of judges in enforcing that constitutional protection. By requiring a full-blown trial in this case, the Ninth Circuit misconstrued both the role of a judge in minimizing the speech-silencing impact of litigation brought by public figures and the nature of the "clear and convincing" evidence of "actual malice" required to remove the First Amendment's protection from speech about public figures.

Sullivan and *Bose* emphasize that courts must, as a matter of law, define the boundary between protected and unprotected speech about public figures.[13] This constitutional

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[11] *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 686 (1989).

[12] *Suzuki*, 330 F.3d at 1115 (Kozinski, J., dissenting).

[13] *E.g.*, *Bose*, 466 U.S. at 501. Even though a finding of actual malice is dependent on the facts of a particular case, the Court explained in *Bose*, "the stakes—in terms of impact on future cases and future conduct—are too great to entrust them finally to the judgment of the trier of fact." *Id.* at

obligation is satisfied when an independent examination of the record is undertaken to ensure that it contains clear and convincing evidence of actual malice.[14] Underscoring these important constitutional principles, the Court in *Liberty Lobby* held that the heightened "clear and convincing" evidence standard imposed on proof of actual malice must be applied at the summary judgment stage as well as following a trial.[15] And, in *Harte-Hanks Communications, Inc. v. Connaughton*, the Court re-emphasized the role of a judge in assessing the evidence of actual malice:

> The question whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice *is a question of law*. This rule is not simply premised on common-law tradition, but on the unique character of the interest protected by the actual malice standard.[16]

It is impossible to square the decision below with these prior holdings. Finding it "plausible" that CU "'rigged' a test to achieve a predetermined result in order to serve its own pecuniary interests," the Ninth Circuit treated the actual malice issue like any other factual dispute and concluded that a jury must decide whether to draw this conclusion. *Suzuki*, 330 F.3d at 1133. Under this Court's precedents, however, the issue for a judge on summary judgment is not whether the jury must "weigh the evidence" with respect to "particular factual predicates of actual malice," *id.* at 1113, but whether, after resolving all conflicts and drawing all reasonable inferences in plaintiff's favor, these "historical facts" provide

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501 n.17. *See* Harry Kalven, Jr., *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 Sup. Ct. Rev. 191, 220 (actual malice is a "constitutional fact" that an appellate court must review *de novo*).

[14] *Bose*, 466 U.S. at 508.

[15] *Liberty Lobby*, 477 U.S. at 252.

[16] 491 U.S. at 685-86 (emphasis added).

sufficient evidence of actual malice to remove the First Amendment's protection from the speech at issue. In other words, after resolving any predicate factual disputes in plaintiff's favor, "the judge must take the further step of independently 'determin[ing] whether the record establishes actual malice with convincing clarity.'"[17] To hold otherwise erodes the constitutional protection mandated in *Sullivan* and disavows the constitutional "imperative that *judges*—and in some cases judges of this Court—make sure that [the actual malice standard] is correctly applied." *Bose*, 466 U.S. at 502 (emphasis added).

III. THE NINTH CIRCUIT'S STANDARD THREATENS THE ROBUST AND WIDE-OPEN EXCHANGE INTENDED BY THE FIRST AMENDMENT

The Ninth Circuit's holding warrants review by this Court for the further reason that it will surely have an impact far beyond the parties to this case. Unlike some situations in which a problematic circuit decision has limited geographic reach, the summary judgment standard adopted in the Ninth Circuit threatens to affect the speech of any news organization with a nationwide audience, limiting particularly national reporting about health and safety issues. If Suzuki Motor Corporation is entitled to a jury's evaluation of the *bona fides* of CU's view that the Samurai "easily" rolls over and is "Not Acceptable," despite CU's full and complete disclosure of the bases for its conclusion, then virtually any product evaluation is at risk and this valuable journalistic genre is seriously compromised.

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[17] *Suzuki*, 330 F.3d at 1113 (Kozinski, J., dissenting) (quoting, *inter alia*, *Bose*, 466 U.S. at 514).

A. The Standard Adopted By the Majority Below Will All But Eliminate the Availability of Summary Judgment on "Actual Malice"

As Justice O'Connor noted in *Waters v. Churchill*, 511 U.S. 661, 669 (1994) (plurality opinion), it is "important to ensure not only that the substantive First Amendment standards are sound, but also that they are applied through reliable procedures." This is nowhere more true than with respect to the procedures mandated by the First Amendment to govern summary judgment in public figure libel cases. Since *Sullivan*, summary judgment has been a significant tool for minimizing the speech-restricting impact of costly libel litigation pursued by well-financed public figures. Reported cases indicate that media libel defendants succeed in obtaining summary judgment nearly eighty percent of the time that it is sought.[18]

The constitutional protection intended by the actual malice standard has, however, contributed surprisingly little to this success rate. Lack of actual malice was a successful ground of decision in only thirty-two percent of reported decisions in which media defendants sought summary judgment.[19] By the

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[18] *See 2001 Summary Judgment Study*, Libel Defense Resource Center, Bulletin No. 3 (Aug. 2001) at 1, 12, Table 5 (reporting data from 1980-2000) ("LDRC Bulletin"). *See also* Katie Eccles, *The Agent Orange Case: A Flawed Interpretation of the Federal Rules of Civil Procedure Granting Pretrial Access to Discovery*, 42 Stan. L. Rev. 1577, 1579 n.4 (1990) ("Eccles") ("[s]eventy-five percent of the motions for summary judgment are granted in favor of the libel defendant"). Moreover, of those reported cases from 1980-2000 in which media defendants took interlocutory appeals of denials of summary judgment, courts reversed the denials 69% of the time. *See* LDRC Bulletin at 20-21, Table 9A (figure includes cases dismissed and remanded).

[19] *See* LDRC Bulletin at 1, 29, Table 11. The LDRC Bulletin reports that there were 1380 reported decisions ruling on defense motions for summary judgment from 1980-2000. *Id.* at 2. Defendants prevailed on the issue of actual malice in 447, or 32%, of those cases. *See id.* at 27-29 & nn. 41, 42, Table 11.

same token, an estimated two-thirds of libel *verdicts* rendered for those plaintiffs who survive summary judgment are ultimately reversed on appeal for lack of the requisite proof of actual malice.[20] This means that many public figure libel cases proceed through expensive trials only to have a resulting jury verdict thrown out after the mandated "independent review" determines the speech at issue is constitutionally protected after all.

This recurring scenario is exemplified by the recent case of *Cobb v. Time, Inc.*, 278 F.3d 629 (6th Cir.), *cert. denied*, 537 U.S. 878 (2002), a libel lawsuit brought by a public figure against *Sports Illustrated* ("*SI*") for its report that he had participated in a fixed boxing match and then used cocaine with his opponent. *SI* based its report on substantial research and investigation, including interviews with Cobb's opponent; the executive director of the state athletic commission; Cobb's promoter; the promoter's business partner; another boxer originally scheduled to fight Cobb that night; and, briefly, Cobb himself. *Id.* at 633-36. *SI* also had reviewed a videotape of the fight and consulted its own in-house boxing experts. *Id.* at 640.

Cobb filed his libel suit in September 1994. The following year, *SI* moved for summary judgment on the ground that the statements at issue were not published with actual malice. The district court denied the motion, in part, because it understood that its role on summary judgment was limited to reviewing plaintiff's evidence of actual malice, and not to

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[20] Susan M. Gilles, *From Baseball Parks to the Public Arena: Assumption of the Risk in Tort Law and Constitutional Libel Law*, 75 Temple L. Rev. 231, 232 n.1 (2002); *see also* Eccles, *supra*, at 1579 n.4 ("[t]he reversal rate on appeal is 60 to 70% of adverse [libel] judgments"); Susan M. Gilles, *Taking First Amendment Procedure Seriously: An Analysis of Process in Libel Litigation*, 58 Ohio State L. J. 1753, 1781 (1998) (concluding that a "high proportion" of libel defendants who proceed to trial should have been granted summary judgment).

evaluating that evidence in the context of the whole record.[21] Four years later, a jury returned a $10.7 million verdict for Cobb. Following post-trial motions and an appeal, in January 2002, nearly seven years after the district court denied summary judgment, the Sixth Circuit vacated the jury verdict and entered judgment for *SI* because its "independent review" of the *entire record* found the evidence of actual malice "far short of the clear and convincing standard." *Id.* at 638.

This is not an isolated example. In *Newton v. National Broadcasting Co.*, 930 F.2d 662, 671 (9th Cir. 1990), a 37-day jury trial followed the district court's denial of summary judgment on actual malice[22] and produced a jury verdict of more than $19 million. Again, the verdict was reversed on appeal because an independent examination of the *entire* record, not conducted on summary judgment, "reveal[ed] almost no evidence of actual malice, much less clear and convincing proof." *Id.* at 687. Such reversals on evidence largely undisputed at the summary judgment stage occur all too often.[23]

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[21] *See Cobb v. Time, Inc.*, No. 3:94-0836, 1995 WL 861518 (M.D. Tenn. Aug. 30, 1995) (modifying original order).

[22] *See Newton v. NBC*, 13 Media L. Rep. 1224 (D. Nev. 1986) (denying summary judgment).

[23] *E.g., Bressler v. Fortune Magazine*, 971 F.2d 1226 (6th Cir. 1992) (reversing jury verdict in favor of public official because "independent examination" revealed insufficient evidence of actual malice); *compare Mercer v. Cedar Rapids*, 104 F. Supp. 2d 1130 (N.D. Iowa 2000) (allowing question of actual malice to go to jury) *with Mercer v. Cedar Rapids*, 308 F.3d 840 (8th Cir. 2002) (reversing jury verdict for plaintiff because district court committed "error of law" in treating "actual malice as a question of fact for the jury"); *Veilleux v. NBC*, 8 F. Supp. 2d 23 (D. Me. 1998) (denying summary judgment) *with Veilleux v. NBC*, 206 F.3d 92 (1st Cir. 2000) (reversing jury verdict after independent review of record established that plaintiff's evidence did not satisfy even negligence standard); *Bose Corp. v. Consumers Union*, 84 F.R.D. 682 (D. Mass. 1980) (denying summary judgment on actual malice) *with Bose Corp. v. Consumers Union*, 692 F.2d 189 (1st Cir. 1982) (reversing trial court's

The holding below will only increase the number of unnecessary and counterproductive trials in public figure libel cases. If the standard adopted by the Ninth Circuit is permitted to govern summary judgment in public figure cases, the cost for news organizations to defend themselves in resulting "mock trials" will be enormous. Indeed, it has been estimated that the cost of litigating a libel case through trial is *four times greater* than the cost to litigate it through summary judgment.[24]

Unnecessary libel trials exact an even greater societal cost because "slow and expensive determination[s]" of libel actions "result in self censorship." *Suzuki*, 330 F.3d at 1115 (Kozinski, J., dissenting). As one commentator has recognized:

> It is no answer . . . that a plaintiff without proof will probably suffer a directed verdict or its equivalent at trial . . . . Plaintiff can still subject the defendant to the high cost and uncertainty of preparing and trying these complex cases and often may be able to force from the defendant an artificially high settlement. Even worse, media defendants subject to such high settlements may lose their zeal for publishing controversial stories.[25]

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verdict after trial, finding insufficient evidence of actual malice), *aff'd*, 466 U.S. 485 (1984).

[24] *See* Rodney A. Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel*, 132 U. Pa. L. Rev. 1, 14 n.81 (1983).

[25] *See* Martin B. Louis, *Summary Judgment and the Actual Malice Controversy in Constitutional Defamation Cases*, 57 S. Cal. L. Rev. 707, 717 (1984). *See also, e.g.*, *Sassone v. Elder*, 626 So. 2d 345, 347 (La. 1993) ("[The] failure to dismiss an unwarranted defamation action by summary judgment produces long and expensive litigation which has a chilling effect upon free speech."); *Chafin v. Gibson*, 578 S.E.2d 361, 368 (W. Va. 2003) ("'Summary judgment serves important functions which would be left undone if courts too restrictively viewed their power. Chief among these are avoidance of long and expensive litigation productive of nothing, and curbing the danger that the threat of such litigation will be used to harass or to coerce a settlement . . . .'") (citation omitted); David

There is simply "no sensible reason to impose such onerous costs on a publisher where the plaintiff is doomed to fail." *Suzuki*, 330 F.3d at 1115 (Kozinski, J., dissenting). As Judge Kozinski observed below, "I know of no other context where we allow a plaintiff to get to trial with a factual record that will not support a verdict in his favor." *Id.* at 1114.

B. The Evidence Deemed Sufficient Below to Create a "Genuine" Dispute About Actual Malice Would Require a Jury Trial Virtually Every Time Product Safety Reporting is Challenged

The holding below also promises a dramatic impact on speech by virtue of its expansive view of the types of evidence with which a public figure can overcome a motion for summary judgment. Specifically, the Ninth Circuit relied largely on two hypotheses advanced by plaintiff as "evidence" of actual malice: a dubious inference of CU's financial motive to falsify its findings, and its disagreement with a government agency about safety testing standards. *See id.* at 1135-36. These "facts," even taken together, cannot properly provide the "quality" and "quantum" of evidence of actual malice demanded under *Liberty Lobby*.

While financial motive can be relevant to the issue of actual malice, the Ninth Circuit has placed undue reliance on a factor that can be alleged—one way or another—in virtually

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A. Anderson, *Is Libel Law Worth Reforming?*, 140 U. Pa. L. Rev. 487, 513 (1991) ("Allowing judges to make these determinations early in the litigation avoids the expense and delay of unnecessary jury trials. These benefits are lost when judges make their decisive judgments only *after* a jury has made its own determination of the matter.") (emphasis added); Scott M. Matheson, Jr., *Procedure in Public Person Defamation Cases: The Impact of the First Amendment*, 66 Tex. L. Rev. 215, 279-80 (1987) (arguing that a rule requiring courts to weigh evidence on summary judgment "would reduce the total procedural costs for the parties and the court by eliminating needless trials and complicated appeals").

any public figure libel case.[26] Nearly *every* publisher, to some degree, "must have economic goals in mind," but other courts repeatedly have refused "to hold that such considerations would indicate actual malice."[27] Indeed, "[i]f a profit motive could somehow strip communications of the otherwise available constitutional protection, our cases from *New York Times* to *Hustler Magazine* would be little more than empty vessels." *Connaughton*, 491 U.S. at 667.

The Ninth Circuit similarly erred in equating a disagreement with the government over testing methods with evidence of CU's knowledge of falsity—a conclusion that seriously misapprehends the role of the press in criticizing, questioning, and interpreting government action.[28] It cannot be that a publisher's disagreement with the findings of a government agency constitutes evidence of actual malice requiring a trial, particularly in the arena of scientific debate:

> Scientific controversies must be settled by the methods of science rather than by the methods of litigation. More papers, more discussion, better data, and more satisfactory models—not larger awards of damages—

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[26] *See Suzuki*, 330 F.3d at 1136; *Kaelin*, 162 F.3d at 1042 (denying summary judgment on actual malice because, *inter alia*, "a reasonable juror [could] draw the inference that [defendant] had a pecuniary motive").

[27] *Foretich v. ABC*, Nos. Civ. A 93-2620, Civ. A 94-0037 (HHG), 1997 WL 669644, at *8 (D.D.C. Oct. 17, 1997); *accord, e.g.*, 1 Robert D. Sack, *Sack on Defamation, Libel, Slander & Related Problems* § 5.5.2, at 5-88 (3d ed. 2000) ("That the defendant publishes for profit, or even in a specific instance to increase profits, is not evidence of 'actual malice.'"); *Peter Scalamandre & Sons v. Kaufman*, 113 F.3d 556, 561 (5th Cir. 1997) (same); *Reuber v. Food Chem. News, Inc.*, 925 F.2d 703, 716 (4th Cir. 1991) (same).

[28] *See, e.g., Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) ("a function of free speech under our system of government is to *invite dispute*") (emphasis added).

> mark the path toward superior understanding of the world around us.[29]

Consumer reporting has historically played an invaluable role in promoting public safety and health. Upton Sinclair's *The Jungle* (1906) exposed the significant risks posed to the food supply by the meat packing industry. Rachel Carson's *Silent Spring* (1962) identified potential hazards posed by the use of chemical pesticides like DDT. Ralph Nader's *Unsafe at Any Speed* (1965) ignited national discussion about auto-safety. Eric Schlosser's *Fast Food Nation* (2002) uncovered unseemly food preparation and labor practices in the fast food industry. All of these important works challenged the conventional, governmentally endorsed wisdom and all would therefore be subject to litigation before a jury under the standard adopted below, as would groundbreaking reporting on the health dangers of smoking and a host of analogous reports about consumer products and business practices.[30]

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[29] *Underwager v. Salter*, 22 F.3d 730, 736 (7th Cir. 1994) (Easterbrook, J.). *See, e.g., Speer v. Ottaway Newspapers, Inc.*, 828 F.2d 475 (8th Cir. 1987) (no actual malice where newspaper published story despite knowledge that its position differed from that of police department); *McFarlane v. Sheridan Square Press, Inc.*, 91 F.3d 1501, 1515 (D.C. Cir. 1996) (defendant under no duty to retract allegations discredited by congressional task force).

[30] The evidence about smoking's hazards was long reported in the media while it was being aggressively disputed by the tobacco industry and by the government. *See, e.g., Smoking Found Tied to Cancer of Lungs*, N.Y. Times, May 27, 1950, at 34 (noting "a significant relationship between prolonged tobacco smoking and the development of cancer of the lung"). *See also* Jennifer Peck, *The Crib-Sheet Catastrophe*, Good Housekeeping, Nov. 1998, at 91 (babies can be strangled to death by ill-fitting crib sheets); Adam Rogers, *Weighty Problems*, Newsweek, July 21, 1997, at 65 (fen-phen linked to heart disorders); Gina Kolata, *Animal Fat Is Tied to Colon Cancer*, N.Y. Times, Dec. 13, 1990, at A1 (red meat linked to colon cancer); Ricardo Alonso-Zaldivar, *Car Booster Seats Defective, Parents Allege in Recall Bid*, L.A. Times, Sept. 24, 2002,

Such reports are particularly valuable to the public because they provide important information that has a direct impact on people's lives, and because most citizens do not otherwise have access to it.[31] As a result, courts historically have given wide berth to the necessarily subjective evaluations and characterizations made in such reports.[32] If the Ninth Circuit is correct, however, "[i]t will be impossible to issue a meaningful consumer review that a band of determined lawyers can't pick apart in front of a jury." *Suzuki*, 330 F.3d at 1113 (Kozinski, J., dissenting).

CONCLUSION

For all the foregoing reasons, the Petition for Writ of *Certiorari* should be granted.

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at A14 (booster seats meeting federal safety standards eject babies during rollovers and cause neck and head injuries).

[31] *See, e.g., United Med. Labs. v. CBS*, 404 F.2d 706 (9th Cir. 1968) (First Amendment protections especially important when issues of public health and safety are at stake); *In re R.M.J.*, 455 U.S. 191, 200 (1982) (the public often "'lacks sophistication'" or access to information necessary to evaluate a manufacturer's claim) (citation omitted); Kathleen M. Sullivan, *Cheap Spirits, Cigarettes, and Free Speech: The Implications of* 44 Liquormart, 1996 Sup. Ct. Rev. 123, 156 (1996) ("the consumer is not expected to have the competence or access to information needed to question the advertiser's claim").

[32] *See, e.g., Flotech, Inc. v. E.I. DuPont De Nemours & Co.*, 814 F.2d 775 (1st Cir. 1987); *Yiamouyiannis v. Consumers Union*, 619 F.2d 932 (2d Cir. 1980); *United Med. Labs. v. CBS*, 404 F.2d 706 (9th Cir. 1968); *Aequitron Med. Inc. v. CBS*, 964 F. Supp. 704 (S.D.N.Y. 1997); *Quantum Elecs. Corp. v. Consumers Union*, 881 F. Supp. 753 (D.R.I. 1995); *Container Mfg. Inc. v. CIBA-GEIGY Corp.*, 870 F. Supp. 1225 (D.N.J. 1994); *Brueggemeyer v. ABC*, 684 F. Supp. 452 (N.D. Tex. 1988); *Nat'l Nutritional Foods Ass'n v. Whelan*, 492 F. Supp. 374, 386 (S.D.N.Y. 1980); *F&J Enters., Inc. v. CBS*, 373 F. Supp. 292 (N.D. Ohio 1974); *Lewis v. Reader's Digest Ass'n*, 366 F. Supp. 154 (D. Mont. 1973); *Safe Site, Inc. v. NRA*, 253 F. Supp. 418, 419 (D.D.C. 1966).

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